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In the

Supreme Court of the United States

October Term, 1951

No. ~~550~~ 29

VIRGINIA REA ASSOCIATION, ET AL.,
Petitioners

v.

FEDERAL POWER COMMISSION AND
VIRGINIA ELECTRIC AND POWER COMPANY,
Respondents

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

ROBERT WHITEHEAD
Lovingston, Virginia
Attorney for Petitioners

WHITEHEAD & MARSHALL
Lovingston, Virginia
Of Counsel

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To the Honorable
The Supreme Court of the United States:

In order to avoid duplication of reading matter, the petitioners herein adopt all the allegations and arguments contained in the petition for writ of certiorari filed in No. ....., The *United States of America, on the relation of Oscar L. Chapman, Secretary of the Interior, Petitioner* v. *Federal Power Commission and Virginia Electric and Power Company, Respondents*, as if fully set forth herein. We shall add

only such matter as appertains to the petitioners, Virginia REA Association and its eleven member cooperatives.

STATEMENT

The Virginia REA Association and its member cooperatives (REA Association) intervened in the proceeding before the Commission in opposition to VEPCO's application. They asserted that they were cooperative associations engaged in the business of selling and distributing power in their respective areas; that under Section 5 of the Flood Control Act of 1944 they were entitled to a preference in the purchase of power generated at the project units in the Congressionally-approved comprehensive plan for the development of the Roanoke River Basin; and that their interests would be adversely affected by the issuance of a license for Roanoke Rapids, because the cost of the power generated at Buggs Island would thereby be increased, and so also would be the price at which the cooperatives could purchase the power generated at Buggs Island and other units in the comprehensive plan.

Although the Commission granted the petition for intervention of the REA Association, it held that "these cooperatives have not shown that under the law as we must administer it, they would be aggrieved by approval of the pending application."

The court below held that the only interest which these petitioners had was to purchase power which the Secretary might sell, but had no duty or responsibility with respect to the construction of this project, and therefore concluded that they were not "aggrieved" by the Commission's order and had no standing in court.

REASONS FOR ALLOWANCE OF THE WRIT

These petitioners have a financial interest which is adversely affected by the Commission's order, because (1) they are competitors of VEPCO and (2) they are substantial purchasers of power for consumers. Both of these interests are recognized by Section 308(a) of the Federal Power Act as warranting the admission of such petitioners as parties to a proceeding before the Commission.[1] By Section 313(b) of the Federal Power Act, they are given a right to obtain a review by the Court of Appeals when these interests are adversely affected by an order of the Commission.

(1) Petitioners' Competitor Interest

The court below failed to recognize that these petitioners, as rural electric cooperatives, are engaged in the business of selling and distributing power in competition with VEPCO. They have a substantial interest in the question whether a license should be granted for a project which is a unit in a Congressionally-approved comprehensive plan. The presence of public power in the area available to petitioners under Section 5 of the Flood Control Act of 1944, gives them a financial advantage which enables them to compete with VEPCO.[2]

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[1] "In any proceeding before it, the Commission, in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State Commission, municipality, or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest."

[2] It is a well established fact that the introduction of low cost public power in an area furnishes a competitive element which reduces electric power rates throughout the area. The impact of public power competition on the rates charged by private utility companies is especially felt in the rates charged to rural cooperatives. As the President's Water Resources Policy Commission recently reported (Report, Vol. I, p. 229): "* * * in areas in which an authorized Federal agency was actively marketing power from river basin developments, the cost of

Under Section 5 of the Flood Control Act of 1944, they have a statutory right to a preference in the purchase of power generated at reservoir projects under the control of the Department of the Army. The Secretary of the Interior is required to sell power to them at cost, and they have entered into a Memorandum of Understanding, for the purchase of power from Buggs Island. The withdrawal of Roanoke Rapids from the comprehensive plan will have a substantial effect on the cost of generation of power in the Buggs Island-Roanoke Rapids area, with the consequence that these petitioners will have to pay more for the power they purchase. Their financial interests are therefore adversely affected, and they are "aggrieved" by the order of the Commission.

In holding to the contrary, the decision below is in conflict with the applicable decisions of this Court in *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U. S. 470, 476-70; *Scripps-Howard Radio, Incorporated* v. *Federal Communications Commission*, 316 U. S. 4, 14-5; as well as with the decision of the District of Columbia Circuit in *National Coal Association, et al.* v. *Federal Power Commission*, 191 F. (2d) 462.

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power purchased by cooperatives from private companies tended to be little more than half as high as the cost of similar power in less fortunate areas." The President's Water Resources Policy Commission illustrated this fact by means of three tables (Vol. I, pp. 229-31). In the first table, the charges by private power companies to rural cooperatives were compared as between the Southeast and the Northeast. The second table presents a comparison of such rates as between the Southwestern and the West-North Central States. The third table compares the rates in the States of Texas and Oklahoma with those in Colorado and the Northeastern States. In the first two tables the rates charged to rural cooperatives by private power companies in States without public power is, on the average, approximately 80% greater than the rates charged by private power companies in States where public power is marketed. In the third table, it is demonstrated that for the year 1950 the former rates exceeded the latter rates by 145%. The above quotation from the Report of the Water Resources Policy Commission is, therefore, very conservative, and may justly be characterized as an understatement of the facts.

(2) Petitioners' Consumer Interest

The REA Association are also purchasers of power in wholesale quantities. As cooperatives they represent and are directly interested in their members, who are the consumers. In this capacity they have a direct interest in the rates charged both by the Secretary and by VEPCO. The Commission's order granting a license for Roanoke Rapids substantially and adversely affects that interest, because, as consumers they would have to pay higher rates for power to VEPCO than to the Secretary. In this respect, also, the petitioners are "aggrieved" by the Commission's order, and the decision below is in direct conflict with the decision of the Second Circuit in *Associated Industries* v. *Ickes*, 134 F. (2d) 694, 697, 699-700.

The court below based its decision on the proposition that the REA Association "has no such right, duty or responsibility with respect to the construction of a power project as would give it standing in court to question an order of the Commission." That conclusion is patently erroneous. Its acceptance means that *no consumer*, no matter how substantial may be his financial interest and no matter how great may be the adverse effect on that interest, has any "right, duty or responsibility with respect to the construction of a power project."

Accordingly, the decision below would mean that no consumer may become a party to the proceeding before the Commission, or may seek judicial review of the Commission's order relating to the construction of power projects. The court's reasoning would apply equally to all other persons seeking judicial review of such orders, except, perhaps, those who file conflicting applications for the development of the same power site.

Under the decision of the court below, all these petitioners can do is to stand on the sidelines, helpless and mute, and watch the power company take away from them and acquire for itself the first right to the power to be produced at the Roanoke Rapids site.

(3) Petitioners' Interest in the Headwater Benefit Payments

Apart from the questions relating to the licensing jurisdiction of the Commission, one of the questions presented in the court below was whether VEPCO's proposed project was "best adapted * * * for the improvement and utilization of waterpower development," one of the conditions for license prescribed in Section 10(a) of the Federal Power Act. To be "best adapted" for this purpose, the proposed project must be economically feasible, which means that the annual cost of the hydro plant must be equal to or less than that of an equivalent steam plant (I, 54-55).

Upon VEPCO's evidence (Exhibit 15; II, 582) the excess annual cost of steam over hydro was shown to be $404,000. The annual costs of the hydro project, as shown in that exhibit, however, did *not include any headwater benefit payments* which VEPCO would be required to pay for the benefits conferred upon its project by the Government's development at Buggs Island, under Section 10(f) of the Federal Power Act. The economic feasibility of the proposed project depended, therefore, on the question whether these payments would be equal to or less than $404,000 per year.

Petitioners had a substantial interest in a proper determination of the headwater benefit payments for the following reasons:

(a) The payments for headwater benefits would go to reduce the cost of power at Buggs Island. This means that the greater the amount of headwater benefit payments, the

less would be the rates which the petitioners would have to pay for such power.

(b) If the amount of headwater benefit payments were determined to be more than $404,000, the petitioners would be adversely affected, because then, if a license were granted, the petitioners as consumers of VEPCO power, would have to pay more for hydro than for steam power.

(c) If the headwater benefit payments were determined to be less than $404,000 and a license were granted, the petitioners would have to pay more for power purchased from VEPCO than if the project were constructed by the United States.

The petitioners contended that the downstream benefits conferred would be approximately $1,955,000 per year, and that the headwater benefit payments under Section 10(f) of the Federal Power Act should be not less than $690,000 per year (II, 614-615, 643-646, 751-752). In other words, the proposed project would be infeasible by at least $290,000 per year, and therefore the license should not be issued.

VEPCO's contention was that, without Buggs Island, the proposed project would have the same dependable capacity as with Buggs Island in operation, but that the Buggs Island Reservoir would enable the downstream project at Roanoke Rapids to increase its output by 70,000,000 kwh per year[3] (Exhibit 28; II, 583); that the excess annual cost of steam over hydro without Buggs Island would be $143,000 per year (Exhibit 28; II, 483); and that therefore the headwater benefit payments should not exceed $261,000 per year (the difference between $404,000 and $143,000). On this basis, according to VEPCO, the project would be feasible by $143,000 per year.

[3] VEPCO's exhibits (15 and 28) show that the 70,000,000 kwh would be "on-peak" power.

The Commission found that Buggs Island would not contribute to the capacity of Roanoke Rapids, but would contribute 70,000,000 kwh of energy per year, *and that the cost of this power to VEPCO, if obtained from a steam plant would be approximately $250,000 per year.* The Commission, therefore, concluded that the headwater benefit payments "could not equitably exceed, on the average, $250,000 annually" (I, 56). It found that the proposed project would be feasible by $150,000 per year.

In the court below, the petitioners contended that the Commission's determination as to the headwater benefit payments was an inference,[4] based upon a finding unsupported by any evidence[5] (that 70,000,000 kwh of "on-peak" energy would cost VEPCO only $250,000 per year), and contrary to the evidence in the record;[6] also that the Commission's determination was not supported by any basic findings required by Section 10(f).[7] The court below erroneously treated the petitioners' contention as an attack on testimony and held that the Commission's determination was supported by substantial evidence.

In order to limit the questions to be presented on petition for writ of certiorari, the petitioners have omitted the important question of whether the Commission properly determined that VEPCO's proposed project would be "best adapted" for the development of power as required by Section 10(a) of the Federal Power Act.

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[4] *Saginaw Broadcasting Company* v. *Federal Communications Commission*, 96 F. (2d) 554, 559.

[5] *Appalachian Electric Power Company* v. *National Labor Relations Board*, 93 F. (2d) 985, 989.

[6] The evidence showed that VEPCO itself paid 9.8 mills per kwh for "on-peak" power. This would mean $686,000, not $250,000 for 70,000,000 kwh.

[7] *United States* v. *Baltimore & Ohio Railroad Company*, 293 U. S. 454, 462.

However, this does not obscure the fact that the petitioners do have a substantial interest which is adversely affected by the Commission's order, and that they are therefore "aggrieved" by this order. Even if it were assumed, since the question is not presented for review, that the court was right in holding that there was no violation of Section 10(a) of the Federal Power Act, the court below erred in holding that the petitioners were not "aggrieved" and had no standing in court.

CONCLUSION

Wherefore, on the basis of the above and of what is set forth in the accompanying petition of the Secretary of the Interior, it is respectfully requested that this petition should be granted.

Respectfully submitted,

VIRGINIA REA ASSOCIATION
MECKLENBURG ELECTRIC COOPERATIVE
SOUTHSIDE ELECTRIC COOPERATIVE
COMMUNITY ELECTRIC COOPERATIVE
PRINCE GEORGE ELECTRIC COOPERATIVE
CENTRAL VIRGINIA ELECTRIC COOPERATIVE
VIRGINIA ELECTRIC COOPERATIVE
NORTHERN NECK ELECTRIC COOPERATIVE
SHENANDOAH VALLEY ELECTRIC COOPERATIVE
B-A-R-C ELECTRIC COOPERATIVE, and
CRAIG-BOTETOURT ELECTRIC COOPERATIVE, and
NORTHERN PIEDMONT ELECTRIC COOPERATIVE

By ROBERT WHITEHEAD
Lovingston, Virginia
Their Attorney

WHITEHEAD & MARSHALL
Lovingston, Virginia